(1) Supreme Court, U.S.

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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 2000

GEORGE ALBERT DANGERFIELD, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was Dangerfield's conviction under a single-count indictment charging him with conspiracy to distribute a quantity of cocaine plain error, when the controlled substances involved in the offense were cocaine powder and cocaine base, but the indictment omitted any reference to cocaine base and made no mention of any drug quantity, thus (a) denying him the notice of the accusation against him required by the Sixth Amendment to the Constitution of the United States and (b) depriving him of the process of law due him under the Fifth Amendment?

2. Was Dangerfield's sentence plain error because: (a) it was premised upon a quantity of cocaine base attributed to him by the sentencing court, when the indictment made no reference to either drug quantity or to cocaine base; (b) it was enhanced based upon a finding by the sentencing court that he had a leadership role in the conspiracy charged, when the indictment contained no facts pertaining to such a role, or otherwise mentioned sentence enhancement; (c) in making its factual findings regarding sentencing the sentencing court did not apply a reasonable doubt standard of proof; (d) he was deprived of his right under the Sixth Amendment to notice of and a jury determination of all factual elements affecting his punishment; (e) he was deprived of his right under the Fifth

Amendment to due process of law; and (f) factual sentencing factors were not determined under a reasonable doubt standard?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceeding in the United States Court of Appeals for the Fourth Circuit, the court whose judgment is sought to be reviewed.

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OPINIONS AND ORDERS BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit is unpublished. It is copied in the Appendix hereto. (App. at 1).

Petitioner is not aware of any reported opinions or orders of the trial court, the United States District Court for the District of Maryland, bearing upon the questions presented by this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 14, 2000. The jurisdiction of this Court to review that judgment is invoked under 28 U.S.C., sec. 1254(l).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner submits that the following constitutional provisions and statutes are involved:

U.S. Const., Amend. V;
U.S. Const., Amend. VI;
21 U.S.C., sec. 841(a)(1), sec. 841(b)(1)(B)(ii)(II), sec. 841(b)(1)(B)(iii), sec. 841(b)(1)(C); sec. 846; and
U.S.S.G., Sec. 3B1.1(a).

Their pertinent text is set out in the Appendix hereto. (App. 4-6).

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance, the United States District Court for the District of Maryland, is that the indictment in this case charged a person living within that State and District with conduct prohibited by a federal criminal statute, thus affording that court jurisdiction over both the subject matter of the charge and the person charged.

On May 18, 1998 Dangerfield was charged in the district court in a single-count indictment which alleged:

> "On or about November 1, 1997 through April 23, 1998, in the State and District of Maryland, George Albert Dangerfield, Jr.[,] the defendant herein, did knowingly, intentionally and unlawfully combine, conspire and confederate with others known and unknown to the grand jury to distribute a quantity of a mixture or substance containing a detectable amount of cocaine, a Schedule 2 Controlled Substance [,] in violation of Title 21, United States Code, Section 841."

(JA 3; the reference "JA" is to the Joint Appendix filed in the Court of Appeals.)

The charge arose from an investigation conducted by federal and Baltimore County, Maryland, drug enforcement personnel which began in late 1997 and concluded on April 23, 1998 when Dangerfield, while returning by automobile from New York, was stopped and arrested in Maryland by surveilling officers. Search of the vehicle (JA 228) disclosed controlled substances (179.1 grams of powder cocaine and 19 grams of cocaine base). (JA 228, 260, 263 [Laboratory Report], 487 [Presentence Report (PSR)] at 2).

The stop, arrest, search and recovery of controlled substances followed, according to police, law enforcement interest in Dangerfield since 1997 (JA 50), including controlled purchases made from him from October, 1997 to February, 1998 (JA 50), and wiretaps during March and April, 1998 on telephones at his home, his office (where he operated a real estate business) and at his mother's home, as well as his cellular phone and a cloned pager. (JA 104, 258-261). More than a thousand activations were monitored on his cell phone (designated by the investigators as the "B" line) alone. (JA 55, 185).

Premised upon their wiretaps, surveillances and other investigatory techniques, police and federal drug enforcement agents believed a person in New York named "Bando" was Dangerfield's source of supply. (JA 59, 117, 273). They twice surveilled Dangerfield when he made trips to New

York, once on April 11, 1998 in response to a call in which they thought he ordered cocaine and crack cocaine from Bando (JA 116, 120) and again on April 23, 1998. (JA 67-69). On the April 11th occasion the surveillance team lost him in Penn Station in New York (JA 120-122, 148-149), although according to police testimony he "did not look or appear like he was avoiding any kind of detection by anybody", but "looked normal." (JA 147).

On April 23, 1998, after intercepted calls again led the investigators to believe Dangerfield would visit Bando in New York, a surveillance team followed him (JA 157-158) to Washington Heights, in Manhattan, where his watchers lost him (160-161, 197, 198), not because of any furtive conduct on his part, but, according to police, because the area was very crowded (JA 160-161, 197, 198) with people and traffic and "it was just the facts and circumstances of New York City is what caused it." (JA 199).

The police had the number of a New York pager they attributed to Bando (JA 208) although its subscriber was a female subject in Washington Heights. They knew the location that the pager "came back to" (JA 209), but did not attempt to surveil that site on April 23rd, even though the assistance of federal agents in New York was available to them (JA 211-213), because, according to the principal Baltimore County police

investigator, they had determined earlier "that the location was very difficult to surveil" (JA 211) and "did not really believe that where a subscriber came back to is where Bando lived." (JA 12).

The surveillance team recovered Dangerfield in the late afternoon of April 23rd when he returned to an automobile he had left in a parking garage located in Philadelphia, from whence he went by train to New York, accompanied by his watchers. He drove back to Baltimore, followed by mobile surveillance. (JA 227-228). Based on intercepted calls from his cell phone (JA 399) while enroute, in one of which (call B-1123; JA 395) he said to someone the government identifies as Mike Leese, "I just come from the market" (JA 396), the investigators decided to arrest him.

When he left southbound I-95 on the ramp leading to westbound Route 43 in Baltimore County, Maryland, Dangerfield was stopped by police units, removed from the car and arrested. The vehicle was driven away by a Baltimore County detective to a nearby police precinct. All of this occurred within "approximately one to two minutes" (JA 228), according to another Baltimore County detective, who also testified, in part, "We had a plan that after the stop of the vehicle, an arrest team would extract Mr. Dangerfield and place him under arrest and place him into a police car." (JA 229). The same detective identified photographs of the car and its contents "once it was back at the White

Marsh Precinct." (JA 230, 401-404; Government's Exhibits 19 A through D).

On April 19, 1999 the district court held an evidentiary hearing on motions filed by Dangerfield, one of which was his motion to suppress evidence (JA 12), filed August 5, 1998 (JA 3; docket entry 10), including the fruits of the warrantless search of the car he was operating when arrested. The court announced that the motions were denied (JA 90) (because, with respect to the motion to suppress evidence seized on April 23rd, it found that the police had probable cause to search the car). On May 17, 1999 the court filed a memorandum (JA 91) and an order (JA 94) implementing its decision.

A jury trial began on June 14 (JA 5) and concluded on June 18, 1999, when a guilty verdict was returned. (JA 6; docket entry 30). On December 3, 1999, after his motion for a new trial (JA 255), filed June 21, 1999 (JA 7; docket entry 41), was heard and denied, a sentencing hearing was conducted and Dangerfield was sentenced to imprisonment for 135 months (JA 353), supervised release for a period of 5 years (JA 354) and a fine of $10,000 (JA 355).

On December 10, 1999 Dangerfield, acting on the premise that the judgment had been entered on December 3rd, filed an appeal to the United State Court of Appeals for the Fourth Circuit. (JA 8; docket entry 54). On December 17, 1999, having

learned that the judgment was not filed until December 7th and his Initial notice of appeal having referred to it as being filed on December 3rd, he filed an amended notice of appeal. (JA 9; docket entry 54, JA 360) reciting the December 7th filing date.

Dangerfield appealed both his conviction and his sentence. In an unpublished per curiam opinion filed on September 14, 2000 (App. 1) the Court of Appeals, which dispensed with oral arguments, stating that "the facts and legal contentions are adequately presented in the materials before the court and arguments would not aid the decisional process" (App. 3), affirmed the judgment of the district court in both respects. It concluded that the police had probable cause "based upon their interception of Dangerfield's phone conversations during his trip to New York" (App. 2) and hence "were not required to obtain a warrant to stop and search Dangerfield's car." (Id.) It stated that, when viewed in the light most favorable to the government, the record contained ample evidence to support Dangerfield's conspiracy conviction. It affirmed the district court's "finding that Dangerfield was a supervisor eligible for a four-level enhancement" (App. 2) pursuant to U.S.S.G. sec. 3B1.1(a). It rejected Dangerfield's contention that the district court had erred in computing his criminal history category under U.S.S.G. sec. 4A1.2(c)(1) when it counted two local law violations, of Baltimore City housing code

ordinances, thus elevating his status from Category II to Category III.

Dangerfield did not in the district court or the Court of Appeals refer to Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), or Apprendi v. New Jersey, ___ U.S. ___, 120 S.Ct. 2348, 147 L.Ed.2d 435, 2000 U.S. Lexis 4304 (2000). He did in both the district court and the Court of Appeals contend, in part, that the four-level enhancement of his sentence was an incorrect application of the guidelines.

REASONS FOR ALLOWANCE OF THE WRIT

1. BOTH DANGERFIELD"S CONVICTION AND HIS SENTENCE CONSTITUTE PLAIN ERROR IN LIGHT OF JONES V. UNITED STATES, 526 U.S. 227, AND APPRENDI V. NEW JERSEY, 120 S.Ct. 2348.

While Dangerfield did not in either of the courts below refer to or raise issues premised upon Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), or Apprendi v. New Jersey, ___ U.S. ___, 120 S.Ct. 2348, 147 L.Ed.2d 435, 2000 U.S. Lexis 4304 (2000) (Jones was decided on March 24, 1999, prior to Dangerfield's June 14-16, 2000 trial in the district court; Apprendi was decided on June 20, 2000, after submission of Dangerfield's initial brief on March 3, 2000 and his reply brief on May 8, 2000 in the Court of Appeals,

but prior to filing of that court's opinion and judgment on September 14, 2000), he submits that, in light of those decisions, his conviction and his sentence run counter to overriding constitutional concerns discussed in those cases and constitute plain error of constitutional dimension which can potentially affect any federal criminal prosecution and which is deserving of the attention of this Court for rectification.

In Jones this Court reiterated that all elements of an offense must be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt. (526 U.S. at 232, 119 S.Ct. at 1219). It also noted the importance of determining if a fact is an element of an offense or a sentencing consideration. It found that the provision of the federal carjacking statute there in issue, providing for steeply enhanced penalties conditioned on further factual findings (of resulting injury or death), were, under the structure of that statute, questionable enough with respect to the "element" or "sentencing factor" conundrum to warrant invoking the rule that,

> "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'"

(526 U.S. at 239, 119 S.Ct. at 1222, citing and

quoting from United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408, 29 S.Ct. 527, 53 L.Ed. 836 (1909).)

This Court there also noted that:

> "While we think the fairest reading of [sec.] 2119 [of the carjacking statute] treats the fact of serious bodily harm as an element, not a mere enhancement, we recognize the possibility of the other view."

(Id.)

In Apprendi, where the defendant fired a number of .22 caliber bullets into the home of an African-American family that had recently moved into a formerly all white neighborhood in Vineland, New Jersey, this Court, dealing with a New Jersey "hate crime", law which permitted imposition of an extended term of imprisonment if a trial judge finds, by a preponderance of the evidence, that the defendant acted with a purpose to intimidate a person or group of people because of race or color, held, referring often to Jones and to In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970), that federal law, through the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees, requires that any fact (other than prior a conviction) increasing the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proved beyond a reasonable

doubt (and that the Fourteenth Amendment requires the same with regard to a state statute).

In Apprendi this Court, commenting on the element/sentencing factor dichotomy, with respect to the "purpose to untimely date" provision of the New Jersey statute, noted in part that:

> ". . . the New Jersey Supreme Court correctly recognized that it does not matter whether the required finding is characterized as one of intent or of motive, because "[1]abels do not afford an acceptable answer." 159 N.J., at 20, 731 A.2d, at 492. That point applies as well to the constitutionally novel and elusive distinction between 'elements', and 'sentencing factors.' McMillan, 477 U.S., at 86 (noting that the sentencing factor--visible possession of a firearm -- might well have been included as an element of the enumerated offenses'). Despite what appears to us the clear 'elemental' nature of the factor here, the relevant inquiry is one not of form, but of effect--does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"

(120 S.Ct. at ___; footnote omitted.)

(a) As to Dangerfield's conviction:

Dangerfield submits that the absence of any mention of cocaine base in the indictment under

which he was prosecuted worked a complete deprivation of that notice of the accusation against him which the Sixth Amendment commands. The charge made against him was conspiracy to distribute cocaine. Such a charge did not and would not per se or necessarily inform him, or a reasonable reader, that he would be subject to conviction thereunder for conspiracy to distribute cocaine base and thus be exposed to a punishment one hundred times more severe than would be the case if the controlled substance involved were cocaine powder. The lack of specificity as to the controlled substance hence is no small matter. Indeed, deeming the indictment employed in the prosecution of Dangerfield as sufficient with respect to giving notice of the accusation made against him vitiates the purpose and intent of the Sixth Amendment's notice guarantee and deprives him of the Fifth Amendment's due process protection. If the information contained in an indictment does not clearly inform a defendant sufficiently to enable him to recognize, without being reduced to guessing, what specific wrongdoing he is alleged to have engaged in and enable him to determine the punishment for that offense, the indictment utterly fails to meet fundamental constitutional demands for notice, recognized in both Jones and Apprendi, that will enable an accused to conduct his defense in an intelligent and meaningful manner.

The indictment in this case also is silent as to drug quantity, a further notice failure which

prevents the defendant from determining with any exactitude the punishment to which the offense sought to be charged exposes him, since drug quantity, under the guidelines, is a determinant of punishment and its omission from the indictment violates the same constitutional concerns and has the same effect on the sufficiency of the indictment as does the absence of specific identification of the controlled substance involved.

(b) As to Dangerfield's sentencing:

Dangerfield's sentence was premised upon a quantity of cocaine base (19 grams) and a quantity of powder cocaine (179.1 grams) attributed to him by the sentencing judge, although the indictment under which he was convicted omitted any mention of cocaine base or of any drug quantity. Dangerfield was sentenced under the guidelines, with a basic offense level of 26, plus a four level enhancement for a leadership role, resulting in a total offense level of 30. Level 26 applies to a quantity of cocaine base of at least 5 grams but less than 20 grams and/or to a quantity of powder cocaine of at least 500 grams but less than 2 kilograms. The level at which 179.1 grams of cocaine are dealt with is level 18 (at least 100 grams but less than 200 grams of cocaine). If that level had been used in Dangerfield's sentencing, then his total offense level, after the 4 level enhancement for a leadership role, would have been level 22. It hence is apparent, since his base offense level was determined to be 26, that he was not

sentenced for cocaine, but for cocaine base, the very substance as to which the indictment is silent, a circumstance which, together with the lack of any disclosure in the indictment of drug quantity, deprived him of notice of the penalties to which he was exposed, an important part of that notice of the nature of the accusation against him with which the Sixth Amendment is concerned.

As to the 4-level enhancement for a leadership role, again there was in the indictment no mention of any facts that would indicate he was charged with that role or that he might be subject to an additional sentence on such a basis. As was stated in Apprendi (supra at 10) the pertinent inquiry is whether a finding exposes a defendant to a greater punishment than that authorized by the jury's guilty verdict. Dangerfield submits that he has seen nothing in his case that indicates the jury found him guilty of conspiracy to distribute cocaine base, with the concomitant 100-fold increase in possible punishment.

Moreover, as Jones and Apprendi both make clear, a fact that increases a permissible penalty for a crime, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. Those requirements were not met in Dangerfield's case. He was charged with and convicted of conspiracy to distribute cocaine, yet sentenced for conspiracy to distribute cocaine base, and all findings pertinent to enhancement of his

sentence were made by the district court judge, but not under a reasonable doubt standard of proof. (During the sentencing hearing the sentencing judge said that he found "by clear and convincing evidence" (JA 330) that Dangerfield qualified for the leadership enhancement. "Clear and convincing evidence" is not the equivalent of "beyond a reasonable doubt.")

Dangerfield submits that the matters referred to hereinabove deprived him of significant constitutional and other rights sufficiently to render his conviction and sentence plain error. He urges that the issues involved are important and pervasive enough in federal criminal proceedings to warrant the attention of this Court.

CONCLUSION

For the reasons stated herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Benjamin Lipsitz,
Counsel of record
Attorney for Petitioner

Baltimore, Maryland
December 13, 2000

APPENDIX

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GEORGE ALBERT DANGERFIELD, JR.,
Defendant-Appellant.

No. 99-4922

Appeal from the United States
District Court for the District
of Maryland, at Baltimore
Andre M. Davis, District Judge
(CR-98-212-AMD)

Submitted: June 13, 2000
Decided: September 14, 2000
Before NIEMEYER and MOTZ. Circuit Judges,
and HAMILTON, Senior Circuit Judge.
Affirmed by unpublished
per curiam opinion.

COUNSEL

Benjamin Lipsitz, Baltimore, Maryland, for Appellant.
Lynne A. Battaglia, United States Attorney, Philip S.
Jackson, Assistant United States Attorney, Baltimore,
Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

George Albert Dangerfield, Jr., appeals his conviction and sentence for conspiracy to distribute cocaine. We affirm.

In 1997 and 1998, Maryland police officers conducted five controlled purchases from Dangerfield and intercepted numerous telephone calls. Their investigation culminated with Dangerfield's arrest as he drove back to Baltimore after a drug-buying excursion to New York.

Dangerfield contends that the vehicle stop during his return to Baltimore and the ensuing search of his car were unlawful because the police lacked probable cause and were required to obtain a warrant. We conclude the police had probable cause, however, based upon their interception of Dangerfield's phone conversations during his trip to New York. See United States v. Cortez, 449 U.S. 411, 419-21 (1981). Moreover, once they had probable cause, they were not required to obtain a warrant to stop and search Dangerfield's car. See Maryland v. Dyson, 527 U.S. 465, 467 (1999) (per curiam) .

Dangerfield also asserts that the evidence was insufficient to support either his conspiracy conviction or his sentencing enhancement for being a

manager of the conspiracy. We disagree. Viewed in the light most favorable to the Government, see Glasser v. United States, 315 U.S. 60, 80 (1942), the record contains ample evidence that Dangerfield and at least five associates engaged in a "concerted undertaking" to distribute cocaine to consumers, United State v. Banks, 10 F.3d 1044, 1054 (4th Cir. 1993). Moreover, in some of the telephone conversation intercepted by the police, Dangerfield gave instructions to these associates; accordingly, the district court did not err in finding that Dangerfield was a supervisor eligible for a four-level enhancement. See U.S.S.G. sec. 3Bl.l(a); see also United States v. Daughtrey, 874 F.2d 213, 217 (4th Cir. 1989) (stating that sentencing court's factual findings will be upheld unless clearly erroneous).

Finally, Dangerfield contends the court erred in computing his criminal history. He asserts that his two convictions for violating local housing code ordinance should have been excluded from the court's calculations pursuant to U.S. Sentencing Guideline Manual sec. 4Al.2(c)(1)(1998). We note that one of these convictions, however, resulted in a sentence of one year of probation and therefore was properly counted as part of Dangerfield's criminal history. See sec. 4Al.2(c)(1)(A). In light of this determination, we need not consider whether Dangerfield's other housing code conviction was properly counted, as his guidelines range would have been the same even if the other conviction had been excluded from his criminal history.

For these reasons, we affirm Dangerfield's conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

U.S. Const., Amend. V, provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

U.S. Const., Amend. VI, provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C., sec. 841, provides in part:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

* * *

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * *

(1)(B) In the case of a violation of subsection (a) of this section involving-

* * *

(ii) 500 grams or more of a mixture or substance obtaining a detectable amount of -

* * *

(II) Cocaine, its salts, optical and geometrical isomers, and salts of isomers;

* * *

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base.

* * *

(C) In the case of a controlled substance in schedule I or II, . . . such person shall be sentenced to a term of imprisonment of not more than 20 years . . . , a fine not to exceed the greater of that authorized in accordance with the provisions of Title

18, or $1,000,000 if the defendant is an individual . . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years . . ., a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual. . . . Any sentence imposing a term of imprisonment under this paragraph shall, . . . if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment.

* * *

21 U.S.C., sec. 846. Attempt and conspiracy, provides:

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

U.S.S.G.. 3Bl.1 (Aggravating Role), provides in part:

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.